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IN THE

Supreme Court Of The United States ^{CLERK}

October Term, 1995

MICHAEL A. WHREN AND JAMES L. BROWN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**BRIEF OF AMICUS CURIAE NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS IN SUPPORT OF PETITIONERS**

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**STATEMENT OF INTEREST
OF THE *AMICUS CURIAE***

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation. NACDL is comprised of more than 8,000 lawyers from throughout the United States and several foreign countries. In addition, NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues of common concern. In conjunction with the affiliates, NACDL speaks for more than 28,000 criminal defense lawyers. NACDL was formed more than 30 years ago to advance the quality of the defense of the rights of accused persons, as well as to advocate the preservation of constitutional rights in this country.

One of NACDL's most important objectives is to establish vigorous enforcement of the individual liberties guaranteed by the Constitution and to deter law enforcement officers from violating those rights. Central to these objectives is vigorous enforcement of the Fourth Amendment. NACDL's *Amicus Curiae* Committee has concluded that the present case could have a significant impact on the right of the American people to be free from warrantless, arbitrary invasions of their right of privacy. NACDL therefore writes in support of petitioners in an effort to ensure that this Court does not, for the first time, permit capricious, bad faith seizures by law enforcement officers.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Warrantless seizures of persons have always been presumed to violate the Fourth Amendment. In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court held that brief, on-the-street seizures would be permissible only if such stops are shown to be objectively reasonable in light of the totality of circumstances. This standard has been successfully applied to an almost limitless assortment of factual situations for nearly thirty years.

The court below erroneously concluded that the "totality of the circumstances" test need not apply in cases in which a law enforcement officer witnesses a violation of even the most trivial traffic offense. Seizures would be permissible even if, in light of the surrounding facts, no reasonable officer would have made the stop. Should this Court adopt that reasoning, police officers will be granted license to arbitrarily stop virtually anyone who ventures onto America's streets and highways. Warrantless seizures at the unfettered discretion of the officer will become the rule, not the exception. The Court must not allow the Fourth Amendment to be stripped of its vitality for the public. Each case must be objectively and reasonably judged based on the totality of the circumstances. Reversal is required.

ARGUMENT

I

OBJECTIVE CONSIDERATION OF THE TOTALITY OF THE CIRCUMSTANCES MUST BE THE MINIMUM STANDARD FOR ALL WARRANTLESS SEIZURES OF PERSONS

The issue presented by this case goes to the very essence of the Fourth Amendment rights of all persons on America's streets and highways. The Court is called upon to decide whether to grant all law enforcement officers unfettered authority to seize any person who commits even the most trivial regulatory violation. Granting such license would permit police officers to make wholesale warrantless seizures even when, under the totality of the circumstances, no reasonable officer would do so.¹ Application of principles that have repeatedly proven sound, coupled with the application of common sense, demonstrate that this Court must deny such authority.

A. The government must prove that warrantless seizures are objectively reasonable in light of all pertinent facts.

This Court has consistently required that government agents obtain warrants from neutral and detached magistrates before conducting searches or seizures. See, e.g. *Katz v. United States*, 389 U.S. 347 (1967); *Beck v. Ohio*, 379 U.S. 89, 96 (1964). In limited circumstances, however, the Court

¹ At the outset, NACDL joins the argument in the *amicus curiae* brief filed by the American Civil Liberties Union (ACLU) that the Fourth Amendment prohibits law enforcement officers from making pretext stops or arrests for trivial offenses when the court finds that the officer's actual purpose was to interrogate or search based on the officer's hunch that a serious offense, unrelated to this stop, was being committed. Because this argument is well developed in the ACLU's brief, it is not restated here.

has recognized that the exigency of an on-the-street encounter between a police officer and a citizen may justify the warrantless seizure of the citizen. When the government has argued that such an exemption should be carved from the Fourth Amendment, the Court always has engaged in painstaking analysis to ensure that such an exemption is consistent with the interests of a free society. When such an exemption has been granted, the Court has been careful to strictly limited its scope.

B. Warrantless seizures may be upheld only if objectively reasonable under the totality of the circumstances.

The Court's analysis in cases such as this involves two components. First, the actions of a police officer always are judged on a standard of reasonableness. *See, e.g., Horton v. California*, 496 U.S. 128, 138 (1990). Second, the legality of an intrusion is objectively decided in light of all the surrounding circumstances. *See, e.g., Graham v. M.S. Connor*, 490 U.S. 386, 396 (1989). Chief Justice Rehnquist, writing for the Court in *Scott v. United States*, 436 U.S. 128, 137 (1978), pointed out, "[A]lmost without exception in evaluating alleged violations in the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." *See also Florida v. Jimeno*, 500 U.S. 248, 250-251 (1987); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 108-109 (1977); *Terry v. Ohio*, 392 U.S. at 21-22. Indeed, such analysis has served the Court so well that it has been applied in other Fourth Amendment contexts. *See, e.g., United States v. Leon*, 468 U.S. 896, 922 (1984).

C. The court below did not follow the objective "totality of the circumstances" standard that this Court requires.

Courts are frequently confronted with arrests made following alleged "pretext" stops. These are generally seizures of motorists for very minor violations under circumstances suggesting that the officer used the minor violation to investigate a serious offense for which the officer lacked cause to interfere with the motorists' Fourth Amendment rights. Most state appellate courts that have decided the issue², as well as the Ninth³ and Eleventh⁴ Circuits, have correctly applied the "reasonable officer/totality of the

² *Townsel v. State*, 763 P.2d 1353, 1354-1355 (Alaska App. 1988); *Mings v. State*, 886 S.W.2d 596 (Ark. 1994); *Kehoe v. State*, 521 So.2d 1094 (Fla. 1988); *People v. Mendoza*, 599 N.E.2d 1375 (Ill. App. 1992); *State v. Izzo*, 623 A.2d 1277 (Me. 1993); *State v. Hoven*, 269 N.W.2d 849, 852 (Minn. 1978); *State v. Van Ackeren*, 495 N.W.2d 630, 642-645 (Neb.), *cert. denied*, 114 S.Ct. 113 (1993); *Alejandro v. State*, 902 P.2d 794, 796 (Nev. 1995); *People v. James*, 630 N.Y.S.2d 176 (N.Y. App. Div. 1995); *State v. Moracco*, 393 S.E.2d 545, 548 (N.C. App. 1990); *State v. Hawley*, 540 N.W.2d 390, 392 (N.D. 1995); *State v. Spencer*, 600 N.E.2d 335, 337 (Ohio App. 1991); *State v. Olaiz*, 786 P.2d 734, 736 (Or. App. 1989); *State v. Sanders*, ____ S.W.2d ____, 1996 W.L. 15650 (Tenn. Cr. App. 1996); *Commonwealth v. Powell*, ____ S.E.2d ____, 1995 W.L. 764082 (Va.App. 1995); *State v. Chapin*, 879 P.2d 300, 303-304 (Wash. App. 1994); *Whiteley v. State*, 418 P.2d 164, 168 (Wyo. 1966).

³ *See, e.g., United States v. Hernandez*, 55 F.3d 443, 445 (9th Cir. 1995).

⁴ *See, e.g., United States v. Valdez*, 931 F.2d 1448, 1450 (11th Cir. 1991). *See also United States v. Scopo*, 19 F.3d 777, 785-786 (2d Cir. 1994)(Newman, J., concurring); *United States v. Causey*, 834 F.2d 1179, 1187 (5th Cir. 1987)(Rubin, J., dissenting); *United States v. Ferguson*, 8 F.3d 385, 396 (6th Cir. 1993)(*en banc*)(Keith, J., dissenting); *United States v. Botero-Ospina*, 71 F.3d 783, 789, 792 (10th Cir. 1995)(*en banc*)(Seymour, C.J., dissenting).

circumstances" test.⁵ Other lower courts have refused to apply this familiar standard, substituting a narrow, restricted inquiry. For example, in the present case, the lower court ruled that police officers may stop and question anyone as long as the officers "witness or suspect a violation of traffic laws, even if the offense is a minor one." *United States v. Whren*, 53 F.3d 371, 375 (D.C. Cir. 1995)(quoting *United States v. Mitchell*, 951 F.2d 1291, 1295 (D.C. Cir. 1991), *cert. denied*, 504 U.S. 924 (1992))(Joint Appendix, "J.A.", at 13). This is frequently referred to as the "could have" test. (*Id.* at 15).

Lower courts that have upheld seizures based on the "could have" test have done so due to either a misinterpretation of the "totality of the circumstances" test or a misunderstanding of this Court's application of the Fourth Amendment to provide reasonable protection of citizens' right to privacy.

1. The "totality of the circumstances" test need not include inquiry into the officer's subjective intent.⁶

Turning first to the error concerning the "totality of the circumstances" test, most of the federal circuit courts - including the court below - have come to the mistaken conclusion that an examination of all of the facts in front of the officer making a challenged traffic stop would necessarily

⁵ This standard in pretext cases is commonly referred to as the "would have" test, in that the issue is whether an objectively reasonable officer "would have" made the challenged seizure in light of the surrounding circumstances. See, e.g., *United States v. Cannon*, 29 F.3d 472, 476 (9th Cir. 1994).

⁶ Officers must not, however, be permitted to deliberately circumvent the requirements of the Fourth Amendment. See note 1, *supra*.

include a review of the subjective thoughts or desires of the arresting officer.⁷

The decision in the present case is typical, stating that an examination of whether a reasonable officer would have made the challenged seizure includes "the necessity for the court's inquiring into an officer's subjective state of mind . . ." (J.A. 16). This conclusion is clearly erroneous; when a seizure is based on a minor traffic violation, there is no reason to apply a standard that is any different from that applied in every other variety of brief, on-the-street seizure. Looking beyond the unduly narrow question of whether the officer witnessed an insignificant traffic violation does not require consideration of the officer's "subjective state of mind"; as the Court of Appeals for the Ninth Circuit stated, "We focus on the objective facts and ask whether a reasonable officer, given the circumstances, would have made the stop absent a desire to investigate an unrelated serious offense." (citations omitted). *United States v. Hernandez*, 55 F.3d at 445. In other words, the applicable standard is the standard that this Court announced a generation ago in *Terry v. Ohio*.

2. The *Terry* standard best serves the interests at stake.

A minority of the lower courts have rejected a totality of the circumstances approach on the grounds that it is too difficult to administer.⁸ This assertion must be rejected for three reasons. First, examinations of all the facts under the

⁷ *United States v. Scopo*, 19 F.3d at 785-786; *United States v. Johnson*, 63 F.3d 242, 247 (3rd Cir. 1995); *United States v. Hassan El*, 5 F.3d 726, 731 (4th Cir. 1993); *United States v. Causey*, 834 F.2d at 1182; *United States v. Hope*, 906 F.2d 254, 257-258 (7th Cir. 1990); *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1991).

⁸ *United States v. Ferguson*, 8 F.3d at 392; *United States v. Botero-Ospina*, 71 F.3d at 786.

objective standard have been successfully conducted in cases involving brief, on-the-street encounters for nearly three decades since this Court decided *Terry v. Ohio*. Determining whether a reasonable officer would make a stop for a minor traffic violation is certainly no more difficult than deciding the reasonableness of a seizure made based on myriad observations in a complex, multiple suspect case in which information is exchanged between officers from different agencies having different interests. It is particularly significant that a majority of the state courts that have addressed the issue have followed the objective totality of the circumstances analysis.⁹ While the federal courts are primarily responsible for interpreting and enforcing the Constitution, the state courts quite naturally have far greater experience with the enforcement of traffic laws.

Secondly, the threat of arbitrary seizures and invasions of privacy far outweighs the minimal benefit to the government in pretext stop cases. This Court has repeatedly applied a balancing test to determine whether the government's interest in interfering with the rights guaranteed by the Fourth Amendment outweighs the public's interest in those rights. *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983); *Delaware v. Prouse*, 440 U.S. at 654; *Pennsylvania v. Mimms*, 434 U.S. at 108-109; *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Terry v. Ohio*, 392 U.S. at 20-21; *Camara v. Municipal Court*, 387 U.S. 523, 534-535 (1967). Such balancing clearly demonstrates that the "totality of the circumstances" test must continue to be applied to all traffic stops, including those purportedly based on insignificant violations. The government's legitimate interest in enforcing minor, frequently arcane motor vehicle laws is hardly a strong one. In situations in which a suspect's

⁹ See note 2, *supra*.

conduct may present a danger to persons or property, a seizure is clearly reasonable and no pretext issue exists. Pretext issues only arise in cases in which an officer has less than a founded suspicion of felonious conduct, and then discovers a minimal violation, such as when a driver's wheel briefly crosses four inches over a lane marker¹⁰, when fuzzy dice are hung from the rear view mirror¹¹, when the motorist turns right without signaling¹² or when a license plate is displayed in the rear window, not attached to the bumper¹³. The government's interest in making such seizures is accurately described as "marginal at best." *Delaware v. Prouse*, 440 U.S. at 660.¹⁴

The threat to privacy, on the other hand, is great. As the Florida Supreme Court has recognized, "It is difficult to operate a vehicle without committing some trivial violation . . ." *Kehoe v. State*, 521 So.2d at 1096. In light of the extensive daily reliance on motor vehicle travel by Americans, the standard adopted by the court below would subject the vast majority of the populace to interference from government agents who seek, without cause, to pry into private affairs or interfere with the right to be left alone.

¹⁰ *United States v. Miller*, 821 F.2d 546 (11th Cir. 1987). See also *Alejandre v. State*, 903 P.2d at 795.

¹¹ *People v. Mendoza*, 599 N.E.2d at 1377.

¹² *State v. Myers*, 798 P.2d 453 (Id. App. 1990).

¹³ *State v. Chapin*, 879 P.2d at 301.

¹⁴ Although courts see pretext issues only when seizures lead to the discovery of evidence of more serious crimes, the discovery of such evidence cannot be weighed on the government's side of the balance because the more serious crimes were not the focus of the seizure. If an officer has sufficient cause to believe that a serious offense is being committed, the seizure will be upheld on that basis and the evidence will be admissible.

Indeed, it would appear that the lower court's erroneous interpretation of the Fourth Amendment would not be limited to motor travel. An officer could seize a pedestrian who crosses a deserted street a few inches outside of a crosswalk. In essence, the approach taken by the court below allows all law enforcement agents to arbitrarily decide who will be hindered and who will be left alone. If the Fourth Amendment is to retain any vitality for citizens walking or driving on our streets and highways, reversal is required.

Finally, it has been claimed that the constricted "could have" test is easier for the courts to apply. Certainly, it would be "easier" to always - or never - require a warrant before any search or seizure is conducted. However, "[b]ecause of the necessarily ad hoc nature of any determination of reasonableness, there can be no inflexible rule of law which will decide every case." *Scott v. United States*, 436 U.S. at 139. See also *Graham v. M.S. Connor*, 490 U.S. at 396; *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). The enforcement of constitutional rights often demands that difficult judicial decisions be made. As Justice Jackson recognized in an opinion that not coincidentally came in the direct aftermath of World War II, "The forefathers, after consulting the lessons of history, designed our constitution to place obstacles in the way of too permeating police surveillance, which they seem to think was a greater danger to a free people than the escape of some criminals from punishment." *United States v. Di Re*, 332 U.S. 581, 595 (1948).

NACDL submits that, when the validity of a seizure based on a minor violation of the law is subject to judicial inquiry under the Fourth Amendment, application of the *Terry* standard properly balances the interests of the parties. The inquiring court must examine the evidence and answer the question, "Would a reasonable officer charged with enforcing

such laws¹⁵ have made the challenged seizure?" If the answer is "yes", the government carries its burden of establishing the lawfulness of the warrantless seizure. The long history of judicial decisions concerning *Terry*-type intrusions provides guidance to police officers, counsel and the courts. This proposal is consistent with the decisions of this Court, provides a workable solution, and properly balances the government's need to investigate crime with the public's right to be free from arbitrary invasions of privacy.

This Court must not permit the Fourth Amendment rights of motorists and pedestrians to be controlled by the unfettered discretion of government agents. If all manner of police officers are allowed to make seizures for infractions so minor that no reasonable officer would make the stop, the Fourth Amendment will be meaningless for anyone who steps onto a street or into a car. The decision of the court below must therefore be reversed.

¹⁵ The assigned duties of the seizing officer provides one of the objective factors that are a part of this inquiry. While it may be reasonable for a traffic officer to stop a motorist for traveling five miles per hour over the speed limit, the same may not be true if the officer's duties are limited to enforcing narcotics laws.

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia must be reversed. This matter must be remanded to the district court for consideration of the legality of the traffic stop in light of the totality of the circumstances.

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